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In the Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 141.

AMBROSE P. S. STUART,

Appellant,

v.

KENT K. HAYDEN, RECEIVER OF CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, ET AL.,

Appellees.

No. 198.

AUGUST T. GRUETTER AND CHARLES F. JOERS,

Appellants,

v.

AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER, ET AL.,

Appellees.

MOTION FOR MODIFICATION OF DECREE AND BRIEF.

G. M. LAMBERTSON,

Solicitor for Kent K. Hayden, Receiver, Appellee.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

AMBROSE P. S. STUART, *Appellant*, v. KENT K. HAYDEN, RECEIVER OF CAPITAL NATIONAL BANK OF LINCOLN, NEBRASKA, ET AL., *Appellees.*	No. 151.
AUGUST T. GRUETTER AND CHARLES F. JOERS, *Appellants*, v. AMBROSE P. S. STUART AND KENT K. HAYDEN, RECEIVER, ET AL., *Appellees.*	No. 160.

G. M. LAMBERSTON, *Solicitor for Kent K. Hayden, Receiver, Appellee.*

MOTION FOR MODIFICATION OF DECREE AND BRIEF.

Comes now Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, and moves the court for a modification of the decree of the court in the above entitled suits so as to provide:

First—For the affirmance of the decree entered by the circuit court of the United States for the district of Nebraska as to Kent K. Hayden, receiver, and a reversal as to Gruetter & Joers, cross-complainants in the court below.

Second—Providing for the allowance of interest on the amount of the stock assessment and on the decree of the circuit court since its rendition.

Notice of this motion has been served upon counsel for appellant and proof of service is filed with the clerk.

G. M. LAMBERTSON,
Solicitor for Appellee.

SIR: The supreme court will be moved as aforesaid on Monday the 7th day of March, 1898, or as soon thereafter as counsel can be heard.

G. M. LAMBERTSON,
Solicitor for Appellee.

To C. C. FLANSBURG, ESQ.,
Solicitor for Appellant.

BRIEF IN SUPPORT OF MOTION.

First—This suit was commenced in the circuit court of the United States for the district of Nebraska by Kent K. Hayden, receiver of the Capital National Bank of Lincoln, Nebraska, against Ambrose P. S. Stuart, to recover $15,000 and interest on a stock assessment made by the comptroller of the currency on 150 shares of stock held by Stuart in the Capital National Bank of Lincoln, Nebraska. On the 23d of April, 1895, a decree was entered in favor of Hayden, receiver, against Stuart for $15,000, together with interest at the rate of 7 per cent from the 10th day of July, 1893, amounting in the aggregate to $16,875.42. (See record, 220.)

Second—A decree was also entered in favor of Gruetter & Joers, cross-complainants, for $20,905. (See record, 220.)

Third—On appeal to the United States circuit court of appeals for the Eighth Circuit, the case was reversed and remanded to the court below with instructions to enter a decree to the effect that the transfer of one hundred and fifty shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver, Hayden, that it be held for naught as to him, and *that he recover of Stuart the assessment levied thereon with his costs;* that appellees Gruetter & Joers are entitled to no relief against Stuart in this suit; that their cross-bill be dismissed and that Stuart recover of them his costs. (See record, 237.)

Fourth—The decree of the supreme court simply affirms the decree of the circuit court of appeals but fails to allow interest either on the assessment made by the comptroller or on the decree rendered by the circuit court.

Fifth—As the interest on $15,000 at 7 per cent interest from the date the comptroller made the assessment, to-wit, July 10, 1893, amounts to over five thousand dollars, it is important to the trust which Mr. Hayden represents to have the mandate of this court direct the circuit court to enter a decree with interest.

Sixth—The effect of the decision of the court of appeals was to reverse the decision of the circuit court as to Gruetter & Joers and affirm it as to Hayden, receiver.

Gaines v. Rugg, 148 U. S., 228.

Such being the clear intention of the court, the failure to direct the lower court to enter a decree for the amount of the assessment, with interest and costs, was doubtless an inadvertence. The allowance of interest by the lower court was not assigned as error by counsel, was not discussed in the briefs, nor alluded to by the court. No reason can be assigned why an assessment on bank stock made by the comptroller should not bear interest. If by fighting a case five years interest can be avoided, then every stockholder would refuse to pay. To so hold is to give a litigious stockholder, who puts the receiver to delay, cost, and expense, an advantage over a stockholder who pays his contractual and statutory obligation when the same falls due.

In *Casey v. Galli*, 94 U. S., 677, where the order was to collect the full amount of the par of the stock, the supreme court say: "The sum to be paid being liquidated and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no notice to pay promptly and no equality between those who should pay then and those who should pay at the end of a protracted litigation."

Seventh—In Nebraska it is provided that on "money due and withheld by unreasonable delay of payment, interest shall be allowed at the rate of seven per cent per annum." See sec. 4, chap. 44, Comp. Stat., 1897, page 692.

Sec. 3, same chapter, provides as follows: "Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid."

Section 966, Revised Statutes of the United States, it is provided that interest "shall be calculated from the date of the judgment at such rate as is allowed by law on judgments recovered in the courts of such state." See rule 23 of Supreme Court.

It therefore seems clear that under the law of the state, the statutes of the United States, and the decision of the supreme court, that Hayden as receiver of the Capital National is entitled to recover judgment for $15,000 and interest from the 10th day of July, 1893, to the 23d day of April, 1895. On that day judgment was entered for $16,875.42, which should bear interest at the rate of 7 per cent per annum until paid.

We contend that the court should affirm the decision of the circuit court with interest and costs. This would carry out the plain import of the decision of the court of appeals and the statutes cited, and would not be in conflict with the decision of this court or the court of appeals.

In another aspect of the case it is important that the decree of the circuit court be affirmed as to Hayden receiver, instead of setting it aside and entering a new judgment for the amount of the assessment less the interest. If the judg-

ment is affirmed the receiver of the bank will have the first lien on Stuart's real estate, if a new decree is entered other judgments since entered aggregating $50,000 may be given precedence over the decree entered in favor of appellee.

We think the motion for the modification of the decree and for an instruction to the lower court to allow appellee interest on his claim and decree should be sustained.

G. M. LAMBERTSON,
Solicitor for Kent K. Hayden, Receiver, Appellee.

Since filing the motion, the following confessi
motion has been filed by Counsel for Appellant:
" Comes now appellant, Ambrose P.S. Stuart, and c
motion of the appellee, Kent K. Hayden, received, fi
praying for a modification of the decree heretof
in this cause, and consents that the decree be mo
as to affirm the decree of the Circuit Court for
of Nebraska, with interest at seven per cent on a

Ambrose P.S. Stuart, Appellant,
by, C.C. Flansburg, Att'y. for
Appellant, Ambrose P.S. Stuart."

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